Supreme Court
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No. 94-1266

In The

Supreme Court of the United States

October Term, 1994

RUSSELL L. THIBODO, et al.

Petitioners,

vs.

BOARD OF TRUSTEES OF THE CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES

The parties to the proceedings are:

Petitioners: Russell L. Thibodo, an individual, and Thibodo Construction Company, Inc., a corporation[1]

Respondent: Board of Trustees of the Construction Laborers Pension Trust for Southern California

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[1] Gary R. Thibodo and Drainage Construction Company were dismissed upon stipulation of the parties in 1990 before this action was dismissed by the district court in 1992. They were not parties to the appeal before the Court of Appeals and have no standing to seek a writ of certiorari from this Court.

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Section 4221(b) [29 U.S.C. § 1401(b)] 2, 6

Section 4301(f) [29 U.S.C. § 1451(f)] 2, 4, 7, 8, 9

STATUTES INVOLVED

Section 4203 of ERISA [29 U.S.C. § 1383] provides in pertinent part that:

(a) Determinative factors

For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer –

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

(b) Building and construction industry

(1) Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the building and construction industry, a complete withdrawal occurs only as described in paragraph (2), if –

(A) substantially all the employees with respect to whom the employer has an obligation to contribute under the plan perform work in the building and construction industry, and

(B) the plan –

(i) primarily covers employees in the building and construction industry, or

(ii) is amended to provide that this subsection applies to employers described in this paragraph.

(2) A withdrawal occurs under this paragraph if –

> (A) an employer ceases to have an obligation to contribute under the plan, and
>
> (B) the employer –
>
> (i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or
>
> (ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

Section 4221(b) of ERISA [29 U.S.C. § 1401(b)(2)] provides that:

> (2) Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the issuance of an arbitrator's award, in an appropriate United States district court in accordance with section 4301 to enforce, vacate, or modify the arbitrator's award.

Section 4301(f) of ERISA [29 U.S.C. § 1451(f)] provides that:

> Time limitations
>
> An action under this section [ERISA § 4301] may not be brought after the later of –
>
> (1) 6 years after the date on which the cause of action arose, or
>
> (2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or

concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

STATEMENT OF THE CASE

On June 20, 1989, Respondent (the "plan") filed this action in the United States District Court for the Central District of California against Petitioners Thibodo Construction Company, Inc., Russell L. Thibodo, G.R. Thibodo Construction Company, Inc., Drainage Construction Company Co., Inc. and Gary R. Thibodo to collect withdrawal liability. In August 1990, G.R. Thibodo Construction Company, Drainage Construction Company, Inc. and Gary R. Thibodo were dismissed without prejudice from this action upon stipulation of the parties. Subsequently, in September 1990, the parties agreed to stay proceedings in the District Court and to submit to arbitration the following two issues: (1) whether the plan correctly determined that Thibodo Construction Company completely withdrew from the plan in 1983; and (2) whether Russell Thibodo was individually liable for the withdrawal liability of Thibodo Construction Company. In October 1990, the District Court entered an order staying proceedings while the parties arbitrated the foregoing issues.

After a hearing before the arbitrator in August 1991, the arbitrator rendered a decision on November 20, 1991, finding in favor of the plan on both issues. On December 2, 1991, the plan notified the District Court of the arbitrator's award by lodging a copy of the award with the District Court. Subsequently, the District Court, which

had retained jurisdiction of this matter, directed the parties to file a joint status report and set the case for a status conference. In the Joint Status Report which the parties filed on February 21, 1992, the parties jointly proposed a motion cutoff date of April 3, 1992; and the plan indicated in the Joint Status Report that the plan intended to file a motion for summary judgment to enforce the arbitration award. After receipt of the Joint Status Report from the parties, the District Court vacated the Status Conference; and on March 12, 1992, the plan filed a motion to enforce the arbitration award.

When Respondent brought a motion to enforce the arbitration award, Petitioners contended that Respondent's action was barred by the six (6) year statute of limitations under section 4301(f) of ERISA [29 U.S.C. § 1451(f)(1)] and by Respondent's failure to bring an action to enforce the award within thirty (30) days of the arbitrator's award. The District Court held that the courts were split as to when a cause of action to collect withdrawal liability begins to run; that some courts hold, as the Petitioners argued, that the statute of limitations begins to run on the date of a complete withdrawal; and others, that the limitations period begins to run from the time that an employer first fails to make timely payment. The District Court agreed with the Petitioners and held that the Respondent's complaint was barred by the statute of limitations.[2] Respondent unsuccessfully sought

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[2] The district court did not address petitioners' argument that the plan's claim was barred by the plan's failure to bring an action to enforce the arbitrator's award within thirty days of the arbitrator's award.

reconsideration and appealed the District Court's decision to the Ninth Circuit Court of Appeals.

The Ninth Circuit reversed the District Court's statute of limitations holding, noting that "under the district court's approach, the limitations period was running against the [plan] before the [plan] acquired a cause of action." 34 F.3d at 914, 917. After unsuccessfully seeking a rehearing before the Court of Appeals, Petitioners filed a petition for writ of certiorari with this Court.

REASONS WHY THE COURT SHOULD DENY THE PETITION FOR CERTIORARI.

Petitioners do not raise any conflict among the Circuits, nor do they raise any question of significant special importance that warrants review of the Opinion of the Ninth Circuit Court of Appeals. Indeed, several of the questions that the Petitioners now seek to raise in this Court were not even addressed in the courts below.

A. Petitioners Are Asking The Court to Review Matters That Were Not Addressed In The Courts Below.

Initially, Petitioners ask this Court to review whether it was "an abuse of discretion for the *Court of Appeals* to find that [the plan's] failure to challenge an arbitrator's award and stipulated finding on a timely basis is *excusable neglect*" (Petition for Writ of Certiorari, Question 1). The Court of Appeals made no such finding of excusable neglect, nor was such finding implicit in the Opinion of the Court of Appeals. The Court of Appeals reviewed de

novo the District Court's ruling on when the statute of limitations begins to run in an action to collect withdrawal liability. Thibodo argued that the statute of limitations began to run on the date of complete withdrawal. The plan argued that the statute could not begin to run until a cause of action accrued. The District Court believed there was conflicting opinion as to when a cause of action accrued, ruled in favor of Thibodo. The Ninth Circuit reversed the District Court decision on appeal and noted that Thibodo had been "unable to cite to any federal court opinion which [Thibodo's] approach has been adopted." 34 F.3d at 917 n. 4. The Opinion of the Court of Appeals was based upon an interpretation of law. The Court of Appeals made no finding whether under ERISA a party must bring an action to enforce an arbitrator's award within 30 days of the award or whether the plan's failure to bring such an action in this case was the result of excusable neglect.

Likewise, neither District Court nor the Court of Appeals addressed the Petitioners' second question whether the plan's failure to move to modify the arbitrator's findings as to the date of Thibodo's withdrawal was fatal. Petitioners, citing the District Court's opinion in *Trustees of Amalgamated Insurance Fund v. Sheldon Hall Clothing, Inc.*, 683 F. Supp. 986, 991 (E.D. Pa. 1988), *aff'd*, 862 F.2d 1020 (3rd Cir. 1988) maintain that 29 U.S.C. § 1401(b)(2) requires that a party must challenge an arbitrator's award within thirty days of issuance of the award, or any objections to the award are forever waived. The Third Circuit interpreted § 1401(b)(2) in the *Sheldon Hall Clothing*, as follows:

> The only logical construction of the MPPAA is for § 1401(b)(2)'s 30-day limitation to apply only to actions to modify or vacate the arbitrator's award, while the three or six-year limitation of § 1451(f) applies to actions to confirm the arbitrator's award. . . . *[W]e do not believe that Congress intended that pension plans be required to reduce favorable arbitration awards to judgment within 30 days upon pain of forever being barred from collecting the award.* (emphasis ours)

862 F. 2d at 1023.

The Third Circuit in *Sheldon Hall Clothing*, then went on to hold that actions to enforce an arbitrator's award under the MPPAA are governed by the three to six year limitations period under 29 U.S.C. § 1451(f). *Id.* Respondent is aware of no holding to the contrary.

B. While There Is A Conflict Among The Circuit Courts As To When A Cause of Action To Collect Withdrawal Liability Accrues, Resolution Of That Conflict Would Not Aid The Petitioners In This Case.

The Ninth Circuit differs with the Federal Circuit and the Seventh Circuit as to when the statute of limitations in an action to collect withdrawal liability begins to run. In this case, the Ninth Circuit held that the statute of limitations begins to run on the date on which the conditions for a complete withdrawal have been met. In this case, the Ninth Circuit held this was in 1985 when Thibodo Construction Company resumed covered work. The Federal Circuit holds that the limitations period does

not begin to run until a plan makes a demand for payment and the employer fails to make payment timely. *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119 (D.C. Cir.) *cert. denied*, 493 U.S. 918 (1989). The Seventh Circuit, as well as a number of trial courts, have followed the latter position, *see, e.g., Central States, Southeast and Southwest Areas Pension Fund v. Navco*, 3 F.3d 167, 171 (7th Cir.) *cert. denied*, 114 S.Ct. 1062 (1994); *ILGWU Nat'l Retirement Fund v. Smart Modes of Cal., Inc.*, 735 F. Supp. 103, 106 (S.D. N.Y. 1990).

Resolution of this conflict will not, however, change the outcome of this case. Respondent initiated the lawsuit in this case within *both* six (6) years of the accrual of a cause of action in 1985 and Thibodo's failure to timely remit payment after the plan made a demand for payment in 1985.

C. The Petitioners' New Statute of Limitations Argument Is Foreclosed By The Express Unequivocal Language Of ERISA Section 4301(f).

The Petitioners now argue that the plan's lawsuit is barred by the three year statute of limitations under ERISA § 4301(f)(2) [29 U.S.C. § 1451(f)(2)] because the plan failed to file its lawsuit within *three* years after the plan became aware of Thibodo's resumption of covered work. This is a new argument that the Petitioners did not previously raise in the courts below.[3] Petitioners' new

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[3] All along, Petitioners previously maintained that this action was governed by the six year limitations period under

statute of limitations argument is foreclosed by the language of section 4301(f) of ERISA which provides:

> An action under this section may not be brought after the **later** of –

(1) 6 years after the date on which the cause of action arose, or

(2) 3 after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action (emphasis ours).

ERISA § 4301(f)(1) [29 U.S.C. § 1451(f)(1]). *See,* the District Court's Order ("Defendants do not contest that the six year statute of limitations period is applicable") (Appendix C, page 20a). Because the Petitioners did not raise the three year statute in the courts below, the Court should not consider this new argument. This is not such an exceptional case, nor is there any important recurring issue that warrants departure from the general rule that questions not raised or resolved in the lower courts are not reviewed by the Court. *Duignan v. United States,* 274 U.S. 195, 200, 47 S.Ct. 566, 568, 71 L.Ed. 996 (1927).

CONCLUSION

For the reasons stated the Petitioners' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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